88-1992

No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

ALCOLAC, INC.,
Petitioner,

vs.

BETTY ELAM, et al.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

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QUESTIONS PRESENTED

With *Browning-Ferris v. Kelco* slated to decide whether or not punitive damages are "excessive fines" under the Eighth Amendment,

(1) Do punitive damages also violate due process requirements of the Fifth and Fourteenth Amendments?

Specifically, as outlined by Justice O'Connor in her concurrence in *Bankers Life v. Crenshaw*,

(2) Does the Missouri Court of Appeals' decision determining petitioner is liable for punitive damages violate due process by delegating to a civil jury, under a civil burden of proof, penal functions of a vague, unlimited nature, with unlimited liability for such punitive damages based not on objective criteria but on a standardless discretion to determine both liability for punitive damages and punishment?

(3) Was due process satisfied when liability for punitive damages was imposed by the Missouri Court of Appeals after changing common law standards and rules as to causation, submissibility and burden of proof, and then retroactively applying such changed standards and rules to conduct of up to ten years past, with no advance notice of liability for punitive damages?

RULE 28.1 STATEMENT

Pursuant to Rule 28.1, of the Rules of this Court, petitioner Alcolac, Inc., states its parent companies are Interchem, Inc.; Waalimpex BV; RTZ Chemicals Overseas Holding, Ltd.; RTZ Chemicals Limited, and Rio Tinto Zinc Corporation PLC. There are no affiliates or subsidiaries which are not wholly owned.

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PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

Alcolac, Inc. (hereinafter "Alcolac"), respectfully petitions for a writ of certiorari to review the judgment of the Missouri Court of Appeals, Western District, in this case.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals, Western District (App., Vol. I., pp. (I)-371), is reported at 765 S.W.2d 42.

JURISDICTION

The opinion of the Missouri Court of Appeals was issued November 1, 1988. A timely Motion for Rehearing and/or Application To Transfer To Supreme Court was denied December 27, 1988. A timely Application To Transfer (to the Supreme Court of Missouri) was denied March 14, 1989. Both (a) Motion for Rehearing/Application To Transfer, and (b) Application To Transfer, had fully set forth and described the federal constitutional issues asserted here as the basis for jurisdiction. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment provides:

> [N]or shall any person . . . be deprived of life, liberty or property without due process of law; . . .

2. The Excessive Fines Clause of the Eighth Amendment provides:

> [N]or [shall] excessive fines [be] imposed, . . .

3. The Due Process Clause of the Fourteenth Amendment provides:

> [N]or shall any state deprive any person of life, liberty or property without due process of law; . . .

STATEMENT

Respondents are some 31 present or former residents of the area around petitioner Alcolac's manufacturing facility near Sedalia, in Pettis County, Missouri. They sued petitioner for environmental injury, with both personal and property damage, arising from Alcolac's operation and use of such facility in manufacturing specialty chemicals.

Respondents brought suit in 1981 in the Circuit Court of Jackson County, Missouri, alleging *inter alia* petitioner Alcolac was negligent in operation of its facilities and had created a nuisance. The record shows petitioner had a net worth of about $15.3 million, although respondents claim it was higher. Jury trial in 1985 took some 4-1/2 months, at the end of which—on December 23, 1985—the jury awarded $43 million as punitive damages. The jury returned 31 personal injury verdicts which were precisely the same for each of the 31 plaintiffs—$200,000 each for compensatory damages, and $1,387,096.70 each for punitive damages. Adding in some $110,595 on 11 nuisance claims, the jury verdicts totalled $49,310,592.70, of which $6,310,595 were compensatory damages, and $42,999,997.70 were punitive damages.

The verdicts for $43 million in punitive damages had been returned on (a) verdict-directing instructions which cited four alternative grounds of negligence, any one of which was sufficient for a finding of liability; (b) civil burden of proof instructions; and (c) punitive damage instructions (M.A.I. 10.02), an example of which stated:

> If you find the issues in favor of plaintiff Betty Elam, and if you believe the conduct of defendant as

> submitted in Instruction Number 9 showed complete indifference to or conscious disregard for the safety of others, then in addition to any damages to which you may find plaintiff Betty Elam entitled under Instruction Number 11 you may award plaintiff Betty Elam an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct.

This instruction was the only punitive damage instruction; no other guidance was given the jury in respect to (a) determining whether petitioner was liable for punitive damages, and (b) determining the extent of any such punitive damage liability.

After-trial motions were filed, and on February 26, 1986, the trial court granted a new trial on both compensatory and punitive damages. In respect to the $43 million punitive damage award, the trial court's Order stated:

> 5. The aggregate amount of the punitive damages awarded exceeds by almost three times the net worth of defendant, and thus is impermissible *as a matter of law* because such verdicts have the effect of confiscating defendant's property without due process of law in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution and Sections 10 and 21, Art. I of the Missouri Constitution [Court's emphasis].
>
> 6. The giving of M.A.I. 10.02 (the punitive damage verdict director) in concert with M.A.I. 3.01 (the civil burden of proof instruction) deprives defendant of equality under the law and deprives defendant of equal protection of law in violation of Section 2 of Article I the Missouri Constitution and Section 1 of

> the Fourteenth Amendment of the U.S. Constitution, respectively, in that defendant is subjected to punitive and penal sanctions pursuant to instructions which are couched in terms of the burden of proof applicable to civil wrongdoing, and not the burden applicable to criminal wrongdoing.

Explaining the above rulings in a Memorandum Opinion, the trial court pointed out that the award of $43 million in punitive damages exceeded defendant's net worth by almost three times, thus effecting a judicial confiscation of defendant's property. Presaging Justice O'Connor's *Bankers Life* concurrence (see (1), *infra*), the trial court noted the above-quoted M.A.I. 10.02 provides no guidance to the jury as to the extent of any pecuniary punishment. He ruled it was "open-ended", allowing the jury to exercise unlimited discretion in a matter of the most serious financial ramifications without sufficient instruction as to the amount of such punitive damages or their financial consequences.

Respondents cross-appealed from such rulings to the Missouri Court of Appeals, Western District. On November 1, 1988, that appellate court reversed the trial court's above rulings as to the unconstitutionality of the punitive damages, saying that in Missouri there was no jurisdiction to rule on the constitutional issues involved other than in the Missouri Supreme Court (App., Vol. I., pp. 357-9). It affirmed liability for punitive damages, but, for other reasons, remanded the case for retrial to determine the extent of punitive damages to be awarded. On March 14, 1989, the Supreme Court of Missouri denied petitioner's Application to Transfer (App., Vol. II., p. A1). Unless a writ of certiorari is issued by the Court, a re-trial is scheduled for later this year.

In both (a) its Motion for Rehearing and/or Application To Transfer, and (b) its Application To Transfer to the Missouri Supreme Court, petitioner asserted and fully specified the constitutional grounds (both federal and state) here relied on (App., Vol. II., pp. A4-6, A28, A30-32, A34, A36-37, A40-41).

On December 5, 1988, this Court granted certiorari in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, No. 88-556. The Court's grant of certiorari was stated to be limited to that portion of Browning-Ferris' petition which raised the issue of whether punitive damages can be deemed an "excessive fine", proscribed by the Eighth Amendment. It does *not* appear the Court agreed to consider due process issues in respect to punitive damage awards.

On April 18, 1989, the Court heard oral argument in *Browning-Ferris*. While reports of the argument, 57 U.S. Law Week 3699-3700 (April 25, 1989), include discussion of due process issues, the Court's reported questions appear to focus on the "excessive fines" aspect.

REASONS FOR GRANTING THE PETITION

(1) Punitive damages violate due process requirements of the Fifth and Fourteenth Amendments.

and

(2) The Missouri Court of Appeals' determination of liability for punitive damages violated due process by delegating to a civil jury, under civil burden of proof, penal functions of a vague, unlimited nature, with unlimited liability for such punitive damages based not on objective criteria but on a standardless discretion to determine both liability for punitive damages and punishment.

Justice O'Connor has best articulated the reasons for granting this petition. In *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. ....., 100 L.Ed.2d 62 (1988), appellant sought review of a Mississippi state court judgment against it imposing punitive damages. The Court deemed the due process claim had not been adequately or properly raised and passed upon in the Mississippi court below, and, for that reason, declined to review such claim. In her concurrence, however, Justice O'Connor set forth the reasons why the Court should, in a proper case (such as we believe this is), review due process claims in respect to state court imposition of liability for punitive damages. She stated:

> Appellant has touched on a due process issue that I think is worthy of the Court's attention in an appropriate case. Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a

> certain mental state. In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause. . . . Punitive damages are not measured against actual injury, so there is no objective standard that limits their amount. . . . [T]he Court should scrutinize carefully the procedures under which punitive damages are awarded in civil lawsuits.
>
> Under Mississippi law, the jury may award punitive damages for any common law tort committed with a certain mental state. . . . Although this standard may describe the required mental state with sufficient precision, the amount of the penalty that may ensue is left completely indeterminate. As the Mississippi Supreme Court said, "the determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury." Id., at 278. This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process. The Court has recognized that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." United States v. Batchelder, 442 US 114, 123, (1979). Nothing in Mississippi law warned appellant that by committing a tort that caused $20,000 of actual damages, it could expect to incur a $1.6 million punitive damage award.

100 L.Ed.2d at 78-9. Justice Scalia indicated he joined in Justice O'Connor's concurrence. 100 L.Ed.2d at 79.

Missouri law is virtually the same as the Mississippi law described in *Bankers Life* by Justice O'Connor. As in Mississippi, Missouri also:

a) Gives civil juries under a civil burden of proof unlimited discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state;

b) Does not measure punitive damages against actual injury; rather, there is no reference to any objective standard to limit imposition or amount;

c) Permits the amount of the ensuing penalty* to remain completely indeterminate, leaving to the jury's sole and complete authority a standardless discretion to determine the severity of the punishment.

See *Labrier v. Anheuser Ford, Inc.*, 621 S.W.2d 51 (Mo. 1981); *Mullen v. Dayringer*, 705 S.W.2d 531 (Mo.App. 1985).

Unlike *Bankers Life*, petitioner's due process claims have here been timely raised and properly preserved. Upon the Missouri Court of Appeals reversing the trial court's rulings as to the unconstitutionality of the punitive damage verdicts, and determining petitioner's liability for punitive damages, petitioner both in its Motion for Rehearing, etc., and in its Application To Transfer, has extensively set forth the constitutional basis of its due process claims, specifying both Missouri constitutional provisions, and the aforesaid Fifth and Fourteenth Amendments to the United States Constitution (App., Vol. II., pp. A4-6, A28, A30-32, A34, A36-37, A40-41). Petitioner also set forth in its pleadings extensive descriptions of the nature of its due process claims, including portions of Justice O'Connor's concurrence in

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*Indeed, Missouri courts refer to punitive damages as "private fines levied by civil juries." *State ex rel. Deering v. Corcoran*, 652 S.W.2d 228, 229 (Mo.App. 1983).

Bankers Life, so as to notify the Court of Appeals and Missouri Supreme Court of its position and to describe the direct applicability of state and federal constitutional requirements of due process to the situation here involved.

As noted above, the Court's decision in *Browning-Ferris* is expected to deal with whether or not punitive damages may be included within the "excessive fines" clause of the Eighth Amendment. Although oral argument on April 18, 1989, appears to have included discussion of the Due Process Clause, both the Court's grant of certiorari and the Court's questions at such oral argument do not indicate the Due Process Clause will be the basis of decision.

In this respect, the relationship of and differences between "excessive fines" and "due process" clauses have been noted. In *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053 (D.N.J. 1989), the district court rejected a claim that punitive damages (in mass tort litigation) were or could be deemed "excessive fines". But it pointed out that the reasons for such determination became "irrelevant" when considered "under the Due Process Clause of the Fourteenth Amendment", 705 F. Supp. at 1060. This because "due process", while including such Bill of Rights protections as "excessive fines", also involves broader concepts. Citing statements of Chief Justice Rehnquist, and of Justices Brennan, Stevens and O'Connor to explain such broader concepts of "due process", the district court stated:

> The Due Process Clause of the Fourteenth Amendment requires that adjudicatory proceedings be fundamentally fair, whether those proceedings be in a criminal or in a civil context. See, *e.g., Lassiter v. Department of Social Services,* 452 U.S. 18 (1981).

705 F. Supp. at 1060-1. Again, Justice O'Connor's above-quoted statements in *Bankers Life* were set forth as an indication of the Court's concern in respect to the Due Process Clause's applicability to punitive damages. In particular, the district court echoed Justice O'Connor's repeated references to the lack of established or recognized standards, the vague guidance given to juries as to the means of calculating damages with standardless discretion to determine the severity of the punishment.

In addition to Justice O'Connor's above concurrence, joined by Justice Scalia, the Court itself has also described its due process concerns in respect to large punitive damage awards being reached without sufficient standards or guidance as "important issues which, in an appropriate setting, must be resolved," see *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828-9 (1986).

It is respectfully submitted this case raises those "important issues" in an appropriate setting, in that such federal constitutional questions have here been properly raised and preserved in the Missouri state courts below.

Unlike the "excessive fines" issues of punitive damages, slated to be determined in *Browning-Ferris*, due process concerns may not necessarily be limited to whether a proceeding is deemed criminal, quasi-criminal or civil. The chief due process deficiencies in respect to punitive damages center about the absence of any standards or guidelines; the lack of any maximum limits; the almost complete reliance on "visceral reactions", which reliance appears to be allowed and even sanctioned by the courts; and the total, unfettered discretion of the jury to penalize or punish as it sees fit—a situation which this Court would never tolerate in respect to criminal statutes. (See (2), *infra.*) Such standardless discretion to

punish frequently can financially destroy a defendant. As the district court noted in *Juzwin*, "it is an awesome power to place in the hands of a jury without limitations or guidelines," 705 F. Supp. at 1055.

Most of this has been alluded to by Justice O'Connor. These "important issues" should be dealt with now and are here presented to the Court in this case.

(3) Due process was not satisfied when liability for punitive damages was imposed by the Missouri Court of Appeals after changing common law standards of causation, submissibility and burden of proof and then retroactively applying such changed standards to conduct of up to ten years past, with no advance notice of liability for punitive damages.

We again refer to Justice O'Connor's concurrence in *Bankers Life*, *supra*. In explaining why the Court should in an appropriate case (such as we believe this case to be) review the due process aspects of state punitive damage awards, she described appellant's contentions in *Bankers Life*:

> [A]ppellant . . . argued . . . Mississippi law chilled its fundamental right of access to the courts by authorizing unlimited punitive damages. . . . [A]ppellant contends that the Mississippi Supreme court changed its standard for judging when an insurer may be liable for punitive damages and applied the new standard retroactively to this case. Appellant explains that it therefore had no advance notice of what conduct could render it liable for punitive damages. Citing cases in which this Court has struck down criminal statutes as void for vagueness, e.g., Roberts v. United States Jaycees, 468 U.S. 609,

> (1984); Giaccio v. Pennsylvania, 382 U.S. 399, (1966), appellant maintains that this violated the Due Process Clause.

100 L.Ed.2d at 77-8. Justice O'Connor then stated the due process aspects should be reviewed by the Court, see quote in (1), *supra*.

Here, the Missouri Court of Appeals repeatedly and openly acknowledged that in reviewing these claims, it felt itself obliged to—and therefore did—create new standards or rules of causation, submissibility and burden of proof, radically departing from previously-existing common law rules. For example, the Court of Appeals felt itself obliged to create a radically new "five-step test" for measuring the submissibility of these claims (App., Vol. I., pp. 259, 368-9). Each of the "five steps" enumerated departs substantially from previously-existing Missouri law. The Court of Appeals then proceeded to retroactively apply each of these five new steps to petitioner's past conduct. Such past conduct had been performed years prior to the Court of Appeals devising its new formula, with no indication when performed that such past conduct would subject petitioner to future liability for punitive damages.

Similarly, it acknowledged that the complete lack of evidence ordinarily required for submission of a negligence claim required it not only to shift the burden of proof to petitioner because, the Court of Appeals held, any lack of proof was petitioner's fault, but also to dispense with ordinary requirements measuring submissibility (App., Vol. I., pp. 259-61, 263, 268)—both steps radical departures from the common law.

While it is not here appropriate to argue these extreme shifts from common law standards and rules, the

point is, as Justice O'Connor states, the retroactive application of such new standards to conduct about which, when performed, there was no indication of incurring open-ended liability for punitive damages, poses serious due process questions. Petitioner in *Bankers Life* had cited to the Court cases in which criminal statutes were voided for vagueness. 100 L.Ed.2d at 78. The Court has repeatedly ruled that a statute must inform in advance as to what acts are prohibited, and must inform in advance as to the penalty for violation. If it does not do so, the Court holds, it is a violation of due process requirements, *U.S. v. Batchelder*, 442 U.S. 114, 123 (1979). In *Batchelder*, cited by Justice O'Connor, the Court per Justice Marshall stated due process requires the two-fold purpose of informing in advance as to (a) what conduct would constitute a violation, and (b) what would be the consequences of a violation:

> It is a fundamental tenet of due process that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). A criminal statute is therefore invalid if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." [citing case] So too, vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute [citing additional cases].

442 U.S. at 123. See also *Connally v. General Construction Co.*, 269 U.S. 385 (1926) [vagueness "violates the first essential of due process of law."]

Here, liability for punitive damages was determined by retroactive application to past conduct of newly-

created standards and rules. No notice of such future changes was ever given. And, as stated in (1), *supra,* it is left entirely to the visceral, unguided, standardless, limitless discretion of the jury to impose both liability for punitive damages and punishment.

Equally important to due process considerations are cases such as *Bouie v. Columbia,* 378 U.S. 347 (1964), where the Court held a subsequent, unforeseeable judicial enlargement by a state appellate court of a statute, applied retroactively, violates the Due Process Clause. The Court reasoned that if a state legislature cannot constitutionally enact an *ex post facto* law, the Due Process Clause prohibits achievement of the same result by judicial construction, 378 U.S. at 353-354.

Similarly, in *diLeo v. Greenfield,* 541 F.2d 949 (2d Cir. 1976), the Court of Appeals held due process requires prior notice of what constitutes forbidden behavior. Retroactive application of subsequently-formulated standards to prior conduct violates due process requirements. The Second Circuit stated:

> The notion of due process requires that sanctions be imposed on individuals only if they could reasonably have known in advance that their questioned behavior had been proscribed. . . . Due Process requires prior notice of what constitutes forbidden behavior. See *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972).

541 F.2d at 953.

Here, the Missouri Court of Appeals formulated substantial, extreme departures from common law standards and retroactively applied them to conduct of up to ten years past, directly resulting in petitioner being

held liable for punitive damages. Such liability for punitive damages was then determined by the Missouri Court of Appeals. Whether such retroactive application of new standards satisfies due process is the issue. It should be reviewed by the Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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